No. 84-1115

FILED
FEB 11 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LEGAL SERVICES CORPORATION, *et al.*,
Petitioners,

v.

EAST ARKANSAS LEGAL SERVICES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly affirmed the decision of the District Court in holding that LSC's proposed reductions in payment of a grant awarded to EALS pursuant to a policy not yet effective constituted a termination of the grant thereby requiring LSC to initiate termination procedures before such action could become final.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent East Arkansas Legal Services (EALS)[1] opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia filed by the Legal Services Corporation (LSC). EALS contends that the opinion of the Court of Appeals[2] below, affirming the decision of the District Court,[3] is a correct

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[1] EALS is a private non-profit organization. There is no parent, subsidiary or affiliate of EALS.

[2] The opinion is reported at 742 F.2d 1472 (D.C. Cir. 1984) and is reproduced in petitioners' appendix at 1a-24a.

[3] Civil action No. 83-2813 (D.D.C. October 4, 1983), reproduced in petitioners' appendix at 25a-32a.

decision which raises no considerations described in Rule 17 of this Court and no issue properly reviewable by a Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE

The facts of the case are stated in the decision of the District Court (petitioners' appendix at 25a-31a) and the Court of Appeals (petitioners' appendix at 1a-24a), *Legal Services Corporation v. East Arkansas Legal Services*, 742 F.2d 1472 (D.C. Cir. 1984).

In petitioners' statement of the case, certain inaccuracies appear. On pages five-six of its petition, LSC asserts that it had a corporate policy since its inception requiring legal services programs to obtain approval to expend fund balances in excess of 10% of their grant and that this policy was subsequently modified by the Board of Directors of LSC on October 5, 1982 in order to preclude grantees from carrying over funds in excess of 10% of their grants[4] (unless LSC granted a waiver of up to 25%). In fact, as found by the District Court, the only policy in effect during this period and during the period when the grant in question was awarded, January 1, 1983, was the policy set forth in the Audit and Accounting Guide for Recipients and Auditors. That policy permitted the use of unspent funds in future grant periods as long as the expenditures were consistent with the terms of the grant. (Petitioners' appendix at 31a). The Board of Directors' resolution did not legally establish a new policy until February 4, 1983, thirty days after its publication in the Federal Register.

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[4] LSC also incorrectly refers to this directive as its valid policy in the formulation of its first question presented for review (petition, at (i)) and in its argument section of the petition (petition, at 8-10).

REASONS FOR DENYING CERTIORARI

I. The Traditional Reasons for Granting Review on Certiorari Are Not Present in This Case

Under Rule 17 of the Supreme Court Rules, this Court grants reviews of writs of certiorari as a matter of judicial discretion, only where there are "special and important reasons". No such reasons are present in the instant case. There is no conflict with other federal courts of appeals or state courts; there has been no departure from usual judicial proceedings; and there are no important questions of federal law involved. See 28 U.S.C. Rule 17.1(A) and (C) (1984). Further, LSC has not shown that this case affects any other litigation. To the best of respondent's knowledge, no other cases raise the same issues.

Despite LSC's allusions to a nationwide problem of $41 million in unexpended balances during 1982 and its concern with recapture of those funds, the limited objective of this lawsuit was the release to EALS of two grant allotments totaling approximately $24,000.00. It was not filed as a class action. LSC released those funds in response to the litigation and there has been no indication it intends to seek recoupment. Those grant funds presumably have now been spent and new grants to EALS have been made in conformity with the fund balance policies in effect at the time of the grants.

The fund balance policy challenged successfully as ineffective at the time the grant in question was made became effective soon thereafter. Since early 1983, it has been significantly modified twice[5] and those subsequent versions applied to carryover balances for later periods. Those changes and the passage of time further diminish any possible relevance of this Court's review of an old policy applicable to a period two years ago.

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[5] The first revision is found at 49 Fed. Reg. 49710, October 27, 1983. Modified a second time, the current fund balance policy is contained in 45 C.F.R. § 1628 (1984).

The special and important reasons identified in Rule 17 "imply a reach to a problem beyond the academic or the episodic," *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955), whereas, in this case, the issues are of isolated and academic significance only.

II. The Decision Below Is Manifestly Correct

The Court of Appeals affirmed the decision of the United States District Court for the District of Columbia which held that LSC's proposed withholding of funds from EALS constituted a termination of its grant within the meaning of 45 C.F.R. § 1606.2(a) (1983) and that EALS was therefore entitled to a hearing under 42 U.S.C. § 2996j(2). LSC's withholding of two allotments constituted a decision that financial assistance be terminated prior to the expiration of the grant within the definition of termination in 45 C.F.R. § 1606.2(a) (1983). LSC argued that the offset was not a termination of financial assistance as set forth in 42 U.S.C. § 2996j because EALS' "annualized level of funding," the total funds available, was not reduced prior to the expiration of the grant. (Petitioners' appendix at 11a). The concept of "annualized level of funding" is a hypertechnical term for internal budget procedures, which was not defined by regulation until after this lawsuit was filed and is not found in the enabling statute. EALS successfully argued below that such resources were irrelevant insofar as a grantee retained statutory and regulatory rights to invoke administrative procedures in challenging a decision to withhold portions of a grant awarded to it. The Court correctly concluded that the term "financial assistance" referred to the grant award for a given year not to the funds potentially available to a grantee. (Petitioners' appendix at 11a-13a). The statutory reference in 42 U.S.C. § 2996j was to termination of "financial assistance" not to "annualized level of funding".

LSC's own regulations are consistent with this interpretation. See 45 C.F.R. § 1601.2(a), § 1623.2. Since LSC decided to reduce the amount it would actually provide under the grant, it was required to adhere to its own statutory and regulatory provisions triggering notice and hearing requirements under 42 U.S.C. § 2996j and 45 C.F.R. § 1606.5-1606.6 (1982).

LSC also argues that even if the offset were a termination, EALS waived its rights under 5 C.F.R. § 1606.4 because its executive director became aware that LSC intended to change the policy. The Court correctly found that whatever notice EALS received it did not comport with the hearing requirements mandated both by the regulations and LSC's enabling statute. (Petitioners' appendix at 17a). The steps that LSC took to develop a new fund balance policy were preliminary; no new policy superseding the audit guide policy could even arguably be valid and effective until February 4, 1983, thirty days after publication in the Federal Register in accordance with the requirements of 42 U.S.C. § 2996g(e), and subsequent to issuance of the 1983 grant.

LSC contends on pages twelve-thirteen of its petition that EALS waived its statutory and regulatory rights to a hearing because of its acceptance of the grant in which a special condition was attached purporting to require it to be bound by the unpublished fund balance policy. The Court noted that the grant agreement was not made part of the record. (Petitioners' appendix at 18a). Had LSC introduced the grant documents, an issue of whether EALS actually agreed to comply with the fund balance policy would have been raised since EALS specifically stated at the time it did not waive any of its statutory or constitutional claims. Regardless, as the Court recognized, since this issue was never properly before the District Court, the Court of Appeals refused to consider it. (Petitioners' appendix at 18a-19a). In its petition, LSC offers no reason why this Court should

depart from its general policy of not deciding questions which have not been resolved in the lower courts. *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Petitioners' second question for review is whether the entry of a permanent injunction by the district court was violative of the public interest. The Order provided that "defendants [were] enjoined from withholding funds awarded to plaintiff until defendant [had] satisfied the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. § 1606.5-1606.6 (1982) as well as 45 C.F.R. § 1606.4 (1983)."

The permanent injunction here was narrow in scope, limited to the facts in this case, and issued to implement the judgment of the Court. The Court issued this permanent injunction once a determination favorable to EALS on the merits was made. Contrary to the implication contained on pages fourteen-fifteen of LSC's petition, the injunction applied only to EALS, not to other legal services program, and did not extend beyond requiring LSC to comply with the statutory and regulatory provisions governing its activities. (Petitioners' appendix at 32a).

It is evident that the public interest is served when an agency complies with its enabling statute and implementing regulations. Once a determination had been made that LSC violated its own statutory and regulatory hearing requirements, it was appropriate to enjoin it from taking any action against EALS circumventing those regulations.

LSC further argues on page fourteen of its petition that it believes an injunction should not have been entered because EALS would not have otherwise been irreparably injured. It provided no further argument in support of this position, although it stated EALS would have had $705,000 at its disposal in 1983. The District

Court specifically found substantial and irreparable injury when it granted the temporary restraining order. (Petitioners' appendix at 33a). Exhibit four to EALS' complaint detailed the crisis for the program and its clients which would have resulted from a $24,000 reduction in payments. Whatever carryover balance existed in the beginning of 1983 was expected to disappear by the end of the year. (Transcript of September 30, 1983 hearing, at 12). This testimony and exhibit were uncontroverted by LSC.

As a separate issue for review, a challenge to the appropriateness of the permanent injunction is wholly lacking in substance and provides no valid basis for review by this Court.

CONCLUSION

The issues presented in the petition neither possess importance nor otherwise merit review by this Court. Moreover, the decisions below were eminently correct in their conclusions and achieved a just result.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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